

**WORD HAS ONEIN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION**

UNITED STATES, *et al.*,

Plaintiffs,

v.

GOOGLE LLC,

Defendant.

No. 1:23-cv-00108-LMB-JFA

**[PROPOSED] ORDER REGARDING USE OF CONFIDENTIAL INFORMATION AT
TRIAL**

This matter comes before the Court pursuant to Local Rule 5 following: (i) Defendant Google LLC’s (“Google’s”) Deposition Testimony Designations (ECF No. 893), (ii) Plaintiffs’ Notice of Intent to Present Deposition Testimony (ECF No. 895), (iii) Google’s Trial Exhibit List (ECF No. 894), (iv) Plaintiffs’ Trial Exhibit List (ECF No. 892), and (v) Plaintiffs’ Objections and Counter-Designations to Defendant’s Deposition Designations (ECF No. 917); and pursuant to the Court’s June 24, 2024 Order providing that any party or non-party who objects to the public use of confidential documents or testimony must file a specific objection with a proposed acceptable redaction of the information (ECF No. 871). Non-party Index Exchange Inc. (“Index”) filed Objections and a Memorandum of Law in Support of Index’s Objections to the Public Use of Confidential Information at Trial (“Index’s Objections”).

Index seeks to maintain under seal the following proposed trial exhibits and deposition testimony designations (“Index Confidential References”) designated by Google and Plaintiffs (the “Parties”) because they contain Index’s highly sensitive proprietary information:

1. The following designations from the deposition testimony of Andrew Casale set forth in

Defendant Google LLC's Deposition Testimony Designations (ECF No. 893) Plaintiffs'

Notice of Intent to Present Deposition Testimony (ECF No. 895) and Plaintiffs'

Identification of Counter Designated Deposition Testimony (ECF No. 917-2):

- a. Page 32, line 23;
 - b. Page 33, lines 15 and 22-24;
 - c. Page 34, lines 3 and 15;
 - d. Page 36, lines 2 and 8;
 - e. Page 81, lines 16-17;
 - f. Page 121, lines 17-18 and 24-25;
 - g. Page 122, lines 3-4;
 - h. Page 136, line 15;
 - i. Page 189, lines 10-11 and 20-21;
 - j. Page 250, line 11;
 - k. Page 251, lines 8-10 and 24; and
 - l. Page 252, lines 2-3, 8-9, and 13-14.
2. References specific to Index in the following exhibits identified in Google's Trial Exhibit List (ECF No. 894):

- a. DTX 1551 (IX_00000001, Index Exchange - Data Requests);
- b. DTX 1651 (Israel Report Snippet of Figure 75 [DTX #1892]);
- c. DTX 1892 (Figure 75, Israel Expert Report, Ad Exchange Average Fees, 2020-2022);
- d. DTX 1893 (Figure 76, Israel Expert Report, Combined Advertiser Buying Tool and Exchange Fees, 2020-2022);

- e. DTX 1949 (Figure 136, Israel Expert Report, Shares Among Ad Exchanges for All U.S. Display Advertising, 2022);
- f. DTX 1956 (Figure 143, Israel Expert Report, Selected Non-Google Ad Exchanges U.S. Indirect Open Web Display (Non-Video) Spending, 2019-2022);
- g. DTX 1989 (Table 22, Israel Expert Report, U.S. Indirect Open Web Display (Non-Video) Exchange Spending Shares, 2019-2022);
- h. DTX 1991 (Table 24, Israel Expert Report, Shares Among Advertiser Buying Tools, Ad Exchanges, and Publisher Ad Servers for All U.S. Display Advertising, 2022);
- i. DTX 2220 (IX-INV-000000002, REG_US DOJ_CID_Index Exchange Inc._Additional Response_FINAL_01Jun2021);
- j. DTX 2043 (Exhibit 3, Chevalier Expert Report Appendix, Monthly Gross Revenue by AdX and Competing Exchanges Based on the Simcoe Report | U.S. Transactions October 2018 - September 2021);
- k. DTX 2044 (Exhibit 4, Chevalier Expert Report Appendix, Monthly Net Revenue By AdX And Competing Exchanges Based On The Simcoe Report I U.S. Transactions October 2018 - September 2021);
- l. DTX 2047 (Exhibit 7, Chevalier Expert Report Appendix, Summary Statistics Of Average Monthly Impressions, Gross Revenue, And Net Revenue By AdX And Competing Exchanges (Excluding Openx) Based On The Simcoe Report | Worldwide & U.S. Transactions);
- m. DTX 2049 (Exhibit 9, Chevalier Expert Report Appendix, Ad Buying

Toolexchange Combinations Average Full-Stack Revenue Share AdX Sell-Side, Xbridge Buy-Side & Third-Party Data |Worldwide Transactions January 2019 - March 2023);

- n. DTX 2051 (Exhibit 3, Chevalier Expert Report, Illustrative Adjustment To Simcoe Figure 8 Average Revenue Share And Cpm | U.S. Transactions January 2019 - March 2023);
- o. DTX 2053 (Exhibit 10, Chevalier Expert Report, AdX And Competing Exchanges Annual Average Revenue Share Compared To All Competing Exchanges Weighted Average Revenue Share Based On The Simcoe Report | AdX Data & Third-Party Data | Worldwide Transactions);
- p. DTX 2054 (Exhibit 13, Chevalier Expert Report, AdX And Competing Exchanges Annual Average Revenue Share Compared To All Competing Exchanges Weighted Average Revenue Share Based On The Simcoe Report | AdX Data & Third-Party Data | U.S. Transactions);
- q. DTX 2056 (Exhibit 20, Chevalier Expert Report, Upr Event Study Regressions Dependent Variables: Log(Gross Revenue) And Log(Net Revenue) Based On The Simcoe Report | Worldwide Transactions October 2018 – September 2021);
- r. DTX 2057 (Exhibit 21, Chevalier Expert Report, Summary Statistics Of Average Monthly Impressions, Gross Revenue, And Net Revenue By AdX And Competing Exchanges Based On The Simcoe Report | Worldwide & U. S. Transactions);
- s. DTX 2058 (Exhibit 22, Chevalier Expert Report, Regression Analysis Of

Post-Upr Changes AdX Vs Aggregate Competing Exchanges Based On The
Simcoe Report | Worldwide Transactions October 2018 – September 2021);

- t. DTX 2064 (Figure 8, Chevalier Expert Report, U.S. Average Full-Stack Revenue Share by Ad Buying Tool – Exchange Combinations (Jan. 2019 – Mar. 2023));
- u. DTX 2065 (Figure 9, Chevalier Expert Report, U.S. Average Revenue Share and CPM by Exchange (Jan. 2019 – Mar. 2023));
- v. DTX 2066 (Figure 10, Chevalier Expert Report, Worldwide Average Revenue Shares of Competing Exchanges Considered by Prof. Simcoe (Jan. 2019 – Mar. 2023));
- w. DTX 2067 (Figure 11, Chevalier Expert Report, Worldwide Monthly Average Revenue Shares by Exchange (Jan. 2016 – Mar. 2023));
- x. DTX 2068 (Figure 12, Chevalier Expert Report, Worldwide Comparison of AdX Revenue Share to Competing Exchanges Weighted Average Revenue Share (Jan. 2016 – Mar. 2023));
- y. DTX 2069 (Figure 13, Chevalier Expert Report, U.S. Monthly Average Revenue Shares by Exchange (Jan. 2016 – Mar. 2023));
- z. DTX 2070 (Figure 14, Chevalier Expert Report, U.S. Comparison of AdX Revenue Share to Competing Exchanges Weighted Average Revenue Share (Jan. 2016 – Mar. 2023));
- aa. DTX 2071 (Figure 15, Chevalier Expert Report, U.S. Comparison of Google Full-Stack Revenue Shares to Competitors Full-Stack Revenue Shares (Jan. 2019 – Mar. 2023));

- bb. DTX 2072 (Figure 17, Chevalier Expert Report, Worldwide AdX and Competing Exchanges Gross Revenue (Oct. 2018 – Sep. 2021));
- cc. DTX 2073 (Figure 18, Chevalier Expert Report, Worldwide AdX and Competing Exchanges Net Revenue (Oct. 2018 – Sep. 2021)); and
- dd. DTX 2076 (Figure 21, Chevalier Expert Report, Worldwide Change in AdX and Competing Exchanges Impressions Post-UPR (Oct. 2018 – Sep. 2021)).

3. References specific to Index in the following exhibits identified in Plaintiffs' Trial

Exhibit List (ECF No. 892):

- a. PTX 1199 (Figure 4, Initial Expert Report of Timothy Simcoe, Effective Take Rate for Worldwide Open Web Display + Video Outstream Impressions);
- b. PTX 1200 (Figure 5, Initial Expert Report of Timothy Simcoe, Worldwide Open Web Display Impressions);
- c. PTX 1203 (Figure 8, Initial Expert Report of Timothy Simcoe, Average CPM Versus Average Take Rate, By Exchange);
- d. PTX 1205 (Figure 15, Initial Expert Report of Timothy Simcoe, But-for Comparable Take Rates, Worldwide Impressions);
- e. PTX 1213 (Figure 25, Initial Expert Report of Timothy Simcoe, But-for Comparable Take Rates, US Impressions);
- f. PTX 1233 (Figure 51, Initial Expert Report of Robin S. Lee, AdX and third-party ad exchanges' shares of ad exchange fees from worldwide indirect open-web display transactions (2022));
- g. PTX 1238 (Figure 48, Initial Expert Report of Robin S. Lee, AdX and third-

party ad exchanges' shares of worldwide indirect open-web display impressions among ad exchange (2022));

- h. PTX 1241 (Figure 54, Initial Expert Report of Robin S. Lee, Worldwide open-web indirect display take rates for ad exchanges, and AdX's worldwide indirect open-web display market share (2018–2022));
- i. PTX 1254 (Figure 84, Initial Expert Report of Robin S. Lee, Exchange impressions and spend by user and publisher location (2022));
- j. PTX 1256 (Figure 86, Initial Expert Report of Robin S. Lee, Relative shares of indirect open-web display impressions by user and publisher location);
- k. PTX 1257 (Figure 87, Initial Expert Report of Robin S. Lee, Relative shares of indirect open-web display fees by user and publisher location);
- l. PTX 1260 (Figure 90, Initial Expert Report of Robin S. Lee, AdX maintains a substantial share of US indirect open-web display impressions transacted through ad exchanges (2018–2022));
- m. PTX 1261 (Figure 91, Initial Expert Report of Robin S. Lee, AdX and third-party exchanges' shares of US indirect open-web display impressions among ad exchanges (2022));
- n. PTX 1262 (Figure 92, Initial Expert Report of Robin S. Lee, AdX earns consistently high net revenues from the sale of US indirect open-web display impressions (2018–2022));
- o. PTX 1263 (Figure 93, Initial Expert Report of Robin S. Lee, AdX maintains a substantial share of ad exchange fees from US indirect open- web display impressions (2018–2022));

- p. PTX 1264 (Figure 94, Initial Expert Report of Robin S. Lee, AdX and third-party exchanges' shares of ad exchange fees from US indirect open-web display transactions (2022));
- q. PTX 1265 (Figure 95, Initial Expert Report of Robin S. Lee, AdX maintains a substantial share of worldwide indirect open-web display spend transacted through ad exchanges (2018–2022));
- r. PTX 1266 (Figure 96, Initial Expert Report of Robin S. Lee, AdX maintains a significant share of US indirect open-web display spend);
- s. PTX 1280 (Figure 110, Initial Expert Report of Robin S. Lee, Summary of worldwide open-web indirect display take rates among ad exchanges);
- t. PTX 1292 (Figure 122, Initial Expert Report of Robin S. Lee, AdX maintains a substantial share of worldwide indirect open-web display impressions transacted through ad exchanges (2018–2022));
- u. PTX 1293 (Figure 123, Initial Expert Report of Robin S. Lee, AdX maintains a significant share of ad exchange fees from worldwide indirect open-web display transactions (2018–2022));
- v. PTX 1294 (Figure 124, Initial Expert Report of Robin S. Lee, AdX maintains a substantial share of US indirect open-web display impressions transacted through ad exchanges (2018–2022));
- w. PTX 1295 (Figure 125, Initial Expert Report of Robin S. Lee, AdX earns consistently high net revenues from the sale of US indirect open-web display impressions (2018–2022));
- x. PTX 1306 (Figure 137, Initial Expert Report of Robin S. Lee, Monthly

coverage of exchanges that produced data (impressions));

- y. PTX 1307 (Figure 138, Initial Expert Report of Robin S. Lee, Monthly coverage of exchanges that produced data (spend));
- z. PTX 1310 (Figure 30, Initial Expert Report of Rosa Abrantes-Metz, Ad Exchange Take Rates);
- aa. PTX 1311 (Figure 31, Initial Expert Report of Rosa Abrantes-Metz, Ad Exchange Take Rate Coefficients of Variation);
- bb. PTX 1312 (Figure 4, Initial Expert Report of Gabriel Weintraub, Monthly Number of Publisher with at Least One Impression Transacted on AdX and Rival Exchanges);
- cc. PTX 1313 (Figure 5, Initial Expert Report of Gabriel Weintraub, Monthly Number of Demand Sources that Served at Least One Impression Through AdX and Rival Exchanges);
- dd. PTX 1314 (Figure 6, Initial Expert Report of Gabriel Weintraub, Monthly Volume of Impressions Won for AdX and Rival Exchanges);
- ee. PTX 1315 (Figure 7, Initial Expert Report of Gabriel Weintraub, Share of Impressions Won Among Bids Submitted (Win Rate) for AdX and Rival Exchanges);
- ff. PTX 1316 (Figure 8, Initial Expert Report of Gabriel Weintraub, Number of Queries Where the Exchange Submitted at Least One Bid);
- gg. PTX 1317 (Figure 9, Initial Expert Report of Gabriel Weintraub, Monthly Advertiser Spend for AdX and Rival Exchanges);
- hh. PTX 1318 (Figure 10, Initial Expert Report of Gabriel Weintraub, Monthly

Net Revenue for AdX and Rival Exchanges);

- ii. PTX 1324 (Figure 16, Initial Expert Report of Gabriel Weintraub, Rival Exchanges Would Need to Dedicate a Substantial Share of their Queries to Experimentation in Order to Run as Many Web Display Experiments as Google in 2018);
- jj. PTX 1364 (Figure 3, Rebuttal Expert Report of Timothy Simcoe, Comparables But-For Take Rate Estimates Excluding One Third- Party Exchange, Worldwide Impressions);
- kk. PTX 1365 (Figure 4, Rebuttal Expert Report of Timothy Simcoe, Event Study But-For Take Rate Estimates Controlling For Adx And Third-Party Exchange Trends, Worldwide Impressions);
- ll. PTX 1366 (Figure 5, Rebuttal Expert Report of Timothy Simcoe, Event Study But-For Take Rate Estimates Controlling For Exchange-Specific Trends, Worldwide Impressions);
- mm. PTX 1367 (Figure 6, Rebuttal Expert Report of Timothy Simcoe, Event Study But-For Take Rate Estimates With Alternative Windows);
- nn. PTX 1368 (Figure 7, Rebuttal Expert Report of Timothy Simcoe, Event Study First Stage Results Using Alternative Ivs);
- oo. PTX 1369 (Figure 8, Rebuttal Expert Report of Timothy Simcoe, Histogram Of But-For Take Rate Estimates From 216 Combinations Of Event Study Specification Alterations);
- pp. PTX 1390 (Figure 22, Rebuttal Expert Report of Robin Lee, Ad exchanges with the highest DV360 spend, by user location (2022));

- qq. PTX 1393 (Figure 26, Rebuttal Expert Report of Robin Lee, Number of worldwide auctions won by the top 10 exchanges in GAM, with and without competition, June 28, 2023);
- rr. PTX 1394 (Figure 27, Rebuttal Expert Report of Robin Lee, Share of worldwide auctions won by the top 10 exchanges in GAM, with and without competition);
- ss. PTX 1395 (Figure 28, Rebuttal Expert Report of Robin Lee, Percent decrease in worldwide publisher payout if exchange was removed);
- tt. PTX 1396 (Figure 29, Rebuttal Expert Report of Robin Lee, Dr. Israel's estimate of US ad exchange fees for indirect web non-video advertising (2020–2022));
- uu. PTX 1397 (Figure 30, Rebuttal Expert Report of Robin Lee, AdX and third-party exchange US indirect web non-video take rates relative to AdX take rate (2020–2022));
- vv. PTX 1408 (Figure 42, Rebuttal Expert Report of Robin Lee, Scale of AdX in comparison to that of non-Google exchanges participating in open bidding, measured by spending on GAM (2022), extension of Israel Report, Table 16, right panel);
- ww. PTX 1409 (Figure 43, Rebuttal Expert Report of Robin Lee, Scale of AdX in comparison to that of non-Google exchanges participating in open bidding, measured by impressions purchased on GAM (2022), extension of Israel Report, Table 16, right panel);
- xx. PTX 1417 (Figure 53, Rebuttal Expert Report of Robin Lee, Average US

- publisher RPM on AdX as compared to rival exchanges (2017–2022));
- yy. PTX 1436 (Figure 73, Rebuttal Expert Report of Robin Lee, Number of auctions won by the top 10 exchanges in GAM, with and without competition, after attributing Reservation bids to exchanges using targeted_custom_criteria1384);
- zz. PTX 1437 (Figure 74, Rebuttal Expert Report of Robin Lee, Share of auctions won with and without competition by the top 10 exchanges in GAM, after attributing Reservation bids to exchanges using targeted_custom_criteria);
- aaa. PTX 1438 (Figure 75, Rebuttal Expert Report of Robin Lee, Percent decrease in publisher payout if exchange was removed, after attributing Reservation bids to exchanges using targeted_custom_criteria);
- bbb. PTX 1440 (Figure 77, Rebuttal Expert Report of Robin Lee, Percent decrease in publisher payout if exchange was removed, US users (June 28, 2023));
- ccc. PTX 1444 (Figure 82, Rebuttal Expert Report of Robin Lee, Percent drop in publisher payout from removing bidding tool, worldwide (June 28, 2023));
- ddd. PTX 1445 (Figure 83, Rebuttal Expert Report of Robin Lee, Percent drop in publisher payout from removing bidding tool, US users (June 28, 2023));
- eee. PTX 1448 (Figure 86, Rebuttal Expert Report of Robin Lee, Extension of Israel Report, Table 16, for AdX and exchanges participating in open bidding on GAM, US (2022));
- fff. PTX 1450 (Figure 88, Rebuttal Expert Report of Robin Lee, Extension of

Israel Report, Table 16, for AdX and exchanges participating in open bidding on GAM, worldwide (2022));

ggg. PTX 1453 (Figure 91, Rebuttal Expert Report of Robin Lee, Scale of AdX in comparison to that of non-Google exchanges participating in open bidding, measured by spending on GAM, worldwide (2022), extension of Israel Report, Table 16, right panel);

hhh. PTX 1454 (Figure 92, Rebuttal Expert Report of Robin Lee, Scale of AdX in comparison to that of non-Google exchanges participating in open bidding, measured by impressions purchased on GAM, worldwide (2022), extension of Israel Report, Table 16, right panel);

iii. PTX 1455 (Figure 93, Rebuttal Expert Report of Robin Lee, Average worldwide publisher RPM on AdX as compared to rival exchanges (2017–2022));

jjj. PTX 1464 (Figure 1, Rebuttal Expert Report of Gabriel Weintraub, Google Ads And DV360 Win More Impressions Than Non-Google Bidders In GAM (June 2023 Bid- Level Data));

kkk. PTX 1468 (Table 1, Rebuttal Expert Report of Gabriel Weintraub, DR. Israel's Table 16 Omits That Google's Products Are Multiples Larger Than "Small" And "Large" Firms That "Successfully Compete");

lll. PTX 1470 (Table 3, Rebuttal Expert Report of Gabriel Weintraub, The Percent Change Across Exchanges Decreases From 12.5 Percent To 2.4 Percent After Separating Out Google From Non- Google Exchanges In Dr. Israel's Table 18); and

mmm. PTX 1471 (Table 4, Rebuttal Expert Report of Gabriel Weintraub, Non-Google Exchanges Saw A Decrease In Ad Spend On DV360 By 20 Percent Following The Implementation Of Poirot V2 In September 2018.

Before this Court may seal documents, it must: “(1) give public notice of the request to seal and allow interested parties a reasonable opportunity to object, (2) consider less drastic alternatives to sealing the documents, and (3) provide specific reasons and factual findings supporting its decision to seal the documents and for rejecting the alternatives.” *Ashcraft v. Conoco, Inc.*, 218 F.3d 282, 288 (4th Cir. 2000) (internal citations omitted).

In compliance with Local Rule 5 and *Ashcraft*, the Parties provided public notice of the Motions to Seal by filing appropriate Notices with the Court. In support of sealing, Index argues the Index Confidential References contain highly confidential and sensitive information regarding Index’s customer pricing, financial results, transactional data, and technical capabilities, release of which would harm Index’s competitive standing. There are no less drastic alternatives to sealing – through redaction – because the unredacted materials contain Index’s competitively sensitive information and the proposed redactions are not overinclusive.

Based on the foregoing, Court FINDS that the information at issue constitutes confidential and proprietary information and that less drastic alternatives to sealing are not feasible.

Accordingly, the Court ORDERS that the aforementioned trial exhibits and deposition designations submitted by the Parties containing the Index Confidential References shall be maintained under seal through redaction. The Clerk is REQUESTED to send a copy of this Order to all counsel of record.

It is so ORDERED.

Hon. Leonie M. Brinkema
United States District Judge

Alexandria, Virginia

Date: _____